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Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-5555.

JAMES McALISTER,
PETITIONER,
v.
COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ARNOLD L. KING,
PETITIONER,
v.
COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ROBERT STILLWELL,
PETITIONER,
v.
COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief for the Respondent in Opposition.

The respondent is not dissatisfied with the petitioners' statement of jurisdiction and citation to opinions below.

Questions Presented.

As understood by the respondent in opposition, the questions presented by the petitioners are:

1. Whether petitioners King and Stillwell were deprived of a representative jury thus violating their right to due process of law by the fact that prospective jurors were instructed, in accordance with the law of the Commonwealth, that if a verdict of murder in the first degree were returned, a jury recommendation that the sentence of death be not imposed must be unanimous in order to avoid imposition of the death sentence, and by the fact that those jurors who indicated that they would be unable to return a verdict of guilty regardless of the evidence were thereby excused by the court because they were found not to stand indifferent?

2. Whether the exclusion of prospective jurors, who stated that they could not return a verdict of guilty of murder in the first degree based upon the evidence if the consequence of that verdict would be a death sentence, deprived the three petitioners of a representative jury on the issue of guilt or innocence in violation of their right to due process of law?

3. Whether petitioners have sufficient data upon which this Court should consider the question of whether the exclusion of prospective jurors whose opposition to the imposition of the death penalty rendered them incapable of returning a verdict based upon the evidence deprived the petitioners of a representative jury on the issue of guilt or innocence or substantially increased the risk of conviction in violation of petitioners' right to due process of law?

Statement of the Case.

Petitioners seek certiorari to review three judgments of the Supreme Judicial Court of Massachusetts.

Petitioner McAlister was convicted of murder in the first degree, armed robbery and unlawfully carrying a firearm. The convictions were affirmed by the Supreme Judicial Court of the Commonwealth of Massachusetts, *Commonwealth* v. *McAlister*, Mass. , 313 N.E. 2d 113 (1974) (App. A), except that the judgment insofar as it imposed the death penalty was reversed and remanded for resentencing to life imprisonment in light of *Furman* v. *Georgia*, 408 U.S. 238 (1972).

Petitioner King was convicted of murder in the first degree and armed robbery; upon a recommendation by the jury that the sentence of death be not imposed, the petitioner was sentenced to life imprisonment. The convictions were affirmed. *Commonwealth* v. *King*, Mass. , 313 N.E. 2d 869 (1974) (App. B).

Petitioner Stillwell was convicted of murder in the first degree and unlawfully carrying a firearm, and, upon recommendation by the jury that the sentence of death be not imposed, the petitioner was sentenced to life imprisonment. The convictions were affirmed. *Commonwealth* v. *Stillwell*, Mass. , 313 N.E. 2d 872 (1974) (App. C).

The petitioners purportedly raise three questions for review by this court.

The respondent in opposition submits that petitioners attempt to raise, in fact, four questions.

Argument.

Reasons Why the Petition is Opposed.

I. Petitioners' Reliance upon Witherspoon v. Illinois, 391 U.S. 510 (1968), in Support of Questions One and Two is Misplaced.

Petitioners King and Stillwell argue that the procedures by which prospective jurors were interrogated as to their

views on capital punishment, and subsequently excused because they were found not to stand indifferent, resulted in a non-representative jury, which did not comply with the standards enunciated in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968).

The respondent submits that the reliance placed upon *Witherspoon* by petitioners King and Stillwell, who were sentenced to life imprisonment, is misplaced.

> "Nor does the decision in this case affect the validity of any sentence *other* than one of death." *Witherspoon* v. *Illinois, supra,* at 523, fn. 21.

> "Our decision in *Witherspoon* does not govern the present case, because here the jury recommended a sentence of life imprison ment." *Bumper* v. *North Carolina,* 391 U.S. 543, 545 (1968).

Petitioner McAlister was convicted of murder in the first degree, armed robbery and unlawful possession of a firearm. There was no recommendation by the jury that the death penalty not be imposed. The case was tried prior to *Furman* v. *Georgia*, 408 U.S. 238 (1972). The judgment against the petitioner insofar as it imposed the penalty of death was reversed by the Supreme Judicial Court and remanded to the Superior Court with instructions to resentence the petitioner to life imprisonment (App. A, p. 14). Therefore, while petitioner McAlister, as distinguished from petitioners Stillwell and King, may have initially challenged his sentence under the *Witherspoon* doctrine, since the sentence has been reversed, he may no longer do so.

> "Inasmuch as the Court today has ruled that the imposition of the death penalty under statutes such as those of Illinois is violative of the Eighth and Four-

> teenth Amendments, *Furman* v. *Georgia, ante,* p. 238, it is unnecessary for us to consider the claim of noncompliance with the *Witherspoon* standards. . . . 'Nor, finally, does today's holding render invalid the *conviction*, as opposed to the *sentence*, in this or any other case.' . . . The sentence of death, however, may not now be imposed." *Moore* v. *Illinois,* 408 U.S. 786, 800 (1972). (Emphasis in opinion.)

Therefore, since *Witherspoon* applies solely to cases involving the death *sentence*, and not to convictions, the petitioners have presented nothing to this Court which would require review of their convictions because of noncompliance with the *Witherspoon* doctrine.

II. Petitioners' Challenge to the Constitutionality of the Unanimity Requirement is Neither Timely Nor does it Have a Constitutional Basis.

A. *There is No Constitutional Basis for Petitioners' Argument.*

Petitioner Stillwell raised this issue in the court below. The Supreme Judicial Court of Massachusetts stated:

> "The defendant's argument rests entirely on the United States Supreme Court reversal of the death penalty in the *Stewart* case which was handed down simultaneously with that court's decision in *Furman* v. *Georgia,* 408 U.S. 238 (1972). *Stewart* v. *Massachusetts,* 408 U.S. 845 (1972). He contends that this reversal must be read to have declared unconstitutional our rule requiring unanimity for a recommendation against the death penalty. The total statement of that court in disposing of the *Stewart* case was the following: 'The appellant in this case was sentenced to death.

> The imposition and carrying out of that death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Furman* v. *Georgia, ante*, p. 238. The motion for leave to proceed *in forma pauperis* is granted. The judgment is therefore vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded for further proceedings.' We do not read this language as having the effect which the defendant contends it has on the rule of our *McNeil* and *Stewart* decisions. The defendant is entitled to no relief on this claim."
>
> Mass. , 313 N.E. 2d at 874 (App. 24).

The respondent submits that the interpretation of Mass. Gen. Laws, c. 265, § 2, by the courts of Massachusetts (*Commonwealth* v. *Stewart*, 359 Mass. 671 (1971); *Commonwealth* v. *McNeil*, 328 Mass. 436 (1952)), raises no constitutional question. Unanimity of the jury on the issue of guilt or sentence is neither required nor prohibited by the Constitution. *Johnson* v. *Louisiana*, 406 U.S. 356, 359 (1972); *Apodaca* v. *Oregon*, 406 U.S. 404 (1972). Petitioners rely upon *Andres* v. *United States*, 333 U.S. 740 (1948), to give constitutional underpinnings to their argument. However, *Andres* dealt solely with a question of federal statutory construction. Therefore, lacking some constitutional requirement, Massachusetts may properly establish its own procedure. *Fay* v. *New York*, 332 U.S. 261 (1947).

B. *Petitioners' Challenge to the Unanimity Requirement Raises Neither a Timely Nor Important Question.*

Under the rule of *Furman* v. *Georgia*, 408 U.S. 238 (1972), the death penalty may no longer be imposed. There-

fore, the complained of unanimity requirement has no application. The petitioners apparently concede the point (Petitioners' Brief, p. 32), but then attempt to assert the rights of persons in those jurisdictions which have re-enacted the death penalty. They may not invoke the jurisdiction of this Court to do so. *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *Joint Anti-Facist Committee* v. *McGrath*, 341 U.S. 123, 151-154 (1951) (Frankfurter, J., concurring).

III. The Massachusetts Procedure for Empanelling a Jury in a Capital Case was a Valid Exercise of the Commonwealth's Authority to Regulate its Judicial Proceedings and does Not Offend the United States Constitution.

Petitioners contend that the Massachusetts procedure for questioning veniremen before empanelling a jury in a capital case resulted in excusing not only those who stated that they would not find the defendant guilty even if the evidence proved guilt beyond a reasonable doubt, but also those who objected to the unanimity requirement for overriding the death sentence (Petitioners' Brief, p. 21). This characterization is incorrect.

As the Massachusetts Supreme Judicial Court expressly stated in *Commonwealth* v. *Stillwell*, Mass. , 313 N.E. 2d 872, 873, fn. 3,

> "These questions [the questions asked the veniremen] were intended to determine (a) whether the venireman had an opinion on capital punishment; (b) whether such opinion, if any, would preclude him from finding the defendant guilty of a crime punishable by death; (c) *whether such opinion, if any, when coupled with his knowledge that it would require a unanimous verdict to recommend that the death penalty not be imposed on a conviction for murder in the first degree,*

> *would preclude him from convicting a person of such a crime;* and (d) whether he had any opinion which would preclude him from voting to recommend that the death penalty not be imposed in such a case." (Emphasis supplied.)

Thus, contrary to petitioners' claim, the questions are designed to exclude only (1) persons whose feelings concerning the death penalty would preclude them from returning a finding of guilty regardless of the evidence and also (2) persons whose opinions would preclude them from voting for clemency. Further, as is clear from those portions of the transcript which petitioners have reprinted in their brief, of the nine jurors excused, eight unequivocally stated that they could not return a verdict of guilty despite evidence of guilt beyond a reasonable doubt.[1] Only one juror was, even arguably, excused for his opposition to the unanimity requirement (Petitioners' Brief, pp. 11-12).

Petitioners, however, contend, based solely on the ambiguities of this colloquy, that an entire class of prospective jurors, not biased with regard to returning a true verdict, were excused from jury service. Petitioners' proof falls far short of that required by *Fay* v. *New York*, 332 U.S. 261 (1947):

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years." *Fay* v. *New York*, 332 U.S. 261, 284 (1947).

Petitioners, relying on *Glasser* v. *United States*, 315 U.S. 60 (1942), and *Fay* v. *New York*, 332 U.S. 261 (1971), claim

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[1] Petitioners' Brief, pp. 5, 7, 9, 13-15.

that this procedure is offensive to the Constitution (Petitioners' Brief, pp. 21-22). Neither of these cases would disapprove the Massachusetts procedure. Both *Glasser* and *Fay* explicitly recognize the right of a state to determine the qualifications of prospective jurors.

Massachusetts has not only the authority, but the duty to so administer its judicial system as to prevent trials from becoming mere "fruitless exercises." *Commonwealth* v. *Stillwell*, Mass. , 313 N.E. 2d 872 (1974). It did so by adopting a method of screening prospective jurors in capital cases and eliminating those who could not find a true verdict. Petitioners now ask this court to examine and invalidate Massachusetts' procedure. Where, as here, the method used is equitable, and necessary to proper administration, this Court has explicitly declined to interfere.

> "The function of this federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ. . . . [B]eyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court always has been careful not so to interpret this Amendment as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences." *Fay* v. *New York, supra*, 294.

IV. The Data Presented by Petitioners does Not Provide a Sufficient Basis upon which This Court should Reconsider Witherspoon v. Illinois, 391 U.S. 510 (1968), at This Time.

As stated above, the *Witherspoon* case is inapplicable to the instant case. Not only was *Witherspoon* limited to

the imposition of the death sentence, but it dealt with a statute which disqualified any juror who stated, "he has conscientious scruples against capital punishment, or that he is opposed to the same." *Witherspoon* v. *Illinois*, 391 U.S. 510, 512 (1968). By contrast, the Massachusetts statute (Mass. Gen. Laws, c. 278, § 3) disqualifies only "[a] person whose opinions are such as to preclude him from finding a defendant guilty of a crime punishable with death. . . ."

In *Witherspoon* v. *Illinois*, *supra*, this Court found that certain data adduced by the petitioner were "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." 391 U.S. at 517. The Court refused to conclude that the exclusion of such jurors resulted in an unrepresentative jury on the issue of guilt or substantially increased the risk of conviction. The Court stated:

> "In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was." 391 U.S. at 518.

Petitioners would have this Court consider several post-*Witherspoon* studies upon which they rely to support their contention that appropriately reliable information is now available to permit this Court to formulate the "*per se* constitutional rule" which it was reluctant to announce in *Witherspoon*.

The Supreme Judicial Court of the Commonwealth of Massachusetts has considered these studies and found them to be insufficient to require reversal of petitioners' convictions. *Commonwealth* v. *McAlister*, *supra*. Massachusetts

does not stand alone in its rejection of these studies. Other state and federal courts, which have had the opportunity to consider them, have rejected them as being too tentative and fragmentary to force reconsideration of the *Witherspoon* standard.[2]

Therefore, the respondent submits, the petitioners have failed to raise an issue in which any conflict among the highest courts of the states or federal judiciary exists. Moreover, that the studies are too inconclusive to support consideration of the issue by this Court was, in effect, admitted by the author of the leading study:

> "It was decided to limit the study to individual rather than group decision-making. Since a jury is a group process, *this limiting feature of the study leaves important questions unanswered.* Although conclusions were drawn about the behavior of prospective jurors who differ in attitude toward capital punishment, these conclusions were in terms of group interaction. The effects of the group process and, for example, the influence of authoritarian personalities upon the group process are as yet unexplored. *In many senses the failure to incorporate group decision-making certainly limits the value of the data obtained.*" Jurow, *New Data On The Effect Of A 'Death-Qualified' Jury On The Guilt Determination Process*, 84 Harv. L. Rev. 567, 596 (1971) (emphasis added).

This admission vividly depicts a basic, if not fatal, limitation of the study. Moreover, the author continues by noting that there is no accurate way to measure the "dif-

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[2] *United States ex rel. Townsend* v. *Twomey*, 452 F. 2d 350, 363 (7th Cir. 1972); *Craig* v. *Wyse*, 373 F. Supp. 1008, 1011 (D. Col. 1974); *Eberheart* v. *State*, 206 S.E. 2d 12, 19 (Ga. Sup. Ct. 1974); *State* v. *Campbell*, 210 Kan. 265, 271 (1972); *People* v. *Rhinehart*, 9 Cal. 3d 142, 144-145 (1973).

ference in behavior between actual jurors and mock jurors participating in experiments." 84 Harv. L. Rev. at 596. He admits being unable to ascertain whether mock jurors share the same feeling of responsibility as actual jurors. He admits that this "felt responsibility"—the state of mind of actual jurors whose decisions carry real consequences—"is particularly important in a capital case where the consequence of conviction may be life imprisonment or death." 84 Harv. L. Rev. at 596.

Jurow also raises the further methodological question:

> ". . . whether the sample in this study is representative of actual jurors. Unfortunately this question cannot be answered with any certainty. There is no way to describe or estimate the 'typical juror'. Jury selection procedures, in different parts of the country, are so disparate and the region of population often so parochial, that identification of a 'typical juror' is virtually impossible." 84 Harv. L. Rev. at 596.

As is obvious from Jurow's own admissions, this study does not measure several fundamental elements which are crucial to a jury's decision-making process. Absent this information the study does not possess the necessary reliability and completeness to be the basis for a constitutional rule. The data presented are still "too tentative and fragmentary."

In view of the inadequacies of the studies upon which petitioners base their case and in view of the fact that the courts which have considered these studies were unanimous in finding them to be inconclusive, the respondent in opposition submits that petitioners have failed to raise a substantial federal question which is ripe for consideration by this Court.

"A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues." *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

Conclusion.

Therefore, the respondent respectfully submits that the Supreme Judicial Court of the Commonwealth of Massachusetts has applied the correct constitutional standards in affirming petitioners' convictions and that nothing has been presented to this Court which requires a reconsideration of those standards on certiorari. The petition should be denied.

Respectfully submitted,

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